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IN THE

Supreme Court of the United States

October Term, 1961

No. **99** 140

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS,
APPELLATE DIVISION OF THE SUPREME
COURT OF THE STATE OF NEW YORK, FIRST
JUDICIAL DEPARTMENT,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE
OF NEW YORK**

HENRY WALDMAN,
Attorney for Petitioner,
5 Beekman Street,
New York 38, New York.

HENRY WALDMAN,
of Counsel.

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IN THE

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No.

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Nathan Willner, your petitioner, prays respectfully, that a writ of certiorari, directed to the Court of Appeals of the State of New York, be issued, to review the amended remittitur or final order of the said Court of Appeals, which affirmed the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which said order denied petitioner admission to the Bar of the State of New York.

The affirmance by the Court of Appeals was without opinion.

A motion to amend the remittitur was made by petitioner; the motion was granted and the remittitur was amended by adding to it the following:

“Upon the appeal herein there was presented and necessarily passed upon a question under the

Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."

Jurisdiction

The jurisdiction of the Court is invoked under Title 28, Sec. 1257(3), U. S. C., and upon the amended remittitur of the Court of Appeals, which states that a question under the Constitution of the United States was raised by the petitioner and necessarily passed upon by the Court.

Question Presented

Whether the Committee on Character and Fitness deprived petitioner of his constitutional rights in refusing to require two lawyers who had presented charges of lack of character and fitness, to appear in person before the Committee, confront the petitioner, be formally sworn as witnesses, and be subject to cross-examination in a formal judicial hearing, conducted in accordance with common law procedure and rules of evidence?

Statement

Petitioner resides at No. 345 East 52nd Street, Manhattan, New York City. He is a citizen of the United States by reason of birth on November 7, 1900. By profession he is a certified public accountant of the State of New York, having been licensed as such by the State of New York on January 3, 1936; his license number is 5245; his license has never been suspended or revoked. He is a member in good standing of the New York State Society of Certified Public Accountants and of the Ameri-

can Institute of Certified Public Accountants, the recognized national organization of Certified Public Accountants.

He graduated from the School of Commerce of New York University in 1923 with the degree of Bachelor of Commercial Science; and from the Law School of New York University in 1930 with the degree of Bachelor of Laws, and in 1934 with the degree of Master of Laws from the same law school. He passed the written examination for admission to the Bar and was duly certified as qualified by the New York State Board of Law Examiners on or about October 29, 1936.

Under New York law, admission to the bar is made by the Appellate Division of the Supreme Court of the State of New York. The name, Supreme Court is a misnomer, for actually it is a court of unlimited original jurisdiction, similar in that respect to the Superior or Circuit Courts in most other states. The Court of Appeals is the supreme court of the state.

Before a candidate for admission may be admitted, he is required to satisfy the court that he is a person of character and fitness sufficient to entitle him to engage in the practice of law. This phase is referred to a committee of lawyers appointed by the court. Under the rules of the committee a questionnaire is furnished the applicant to be filled out by him. In addition, the names of the candidates are published in the New York Law Journal, a daily newspaper, which is the official legal publication, with a request that anyone having information of any candidate, communicate it to the committee.

Petitioner filed the questionnaire with the committee. Several hearings were had before a subcommittee of three of its members. In October, 1938, the Committee filed a report with the Appellate Division that it is not satisfied that he possessed the character and general fitness

requisite for an attorney and counsellor at law as is provided by Section 88 of the Judiciary Law of New York, without stating the reasons for its decision. The Appellate Division denied admission.

Petitioner, ever since, has tried, by repeated applications to be admitted to the Bar, but without success.

The repeated applications, over a period of almost a quarter of a century, were always denied by the courts unanimously and without opinion—not even by a two-line memorandum. The decision of the Court of Appeals, now sought to be reviewed by this court, was without opinion. In the case of each of his applications, a copy of his motion papers was served on the Committee on Character and Fitness, but in none of the applications did the Committee appear, either by service of an answer or by a personal appearance by a member or by counsel. It treated the applications with silent contempt. Since no reason was given for the repeated denials for admission, petitioner surmises and believes that two communications in writing from two lawyers was the cause. The names of the lawyers are Leo M. Wieder and James Dempsey. Petitioner does not know whether the complaints were in affidavit form or merely letters, for though told of them, he was not permitted to see or read them.

Neither of the lawyers was required to appear before the Committee to confront the petitioner, to be sworn as witnesses, where they could be subjected to cross-examination by petitioner or his counsel, in a formal judicial hearing, conducted in accordance with common law procedure and rules of evidence. The Committee apparently deems itself, not an agent or arm of a court but as an administrative agency of the Executive branch of the government, which sometimes processes matters before it by fiat.

There are two issues of fact to be determined by the Appellate Division in favor of the applicant for admis-

sion to the Bar, followed by the entry of a decree admitting him to the Bar. The proceeding for admission is a special proceeding, in nowise different from any other special proceeding, where a formal trial or hearing is had, where in accordance with common law trial and procedure, it terminates in a formal order or decree. There are two issues of fact in a proceeding for admission to the Bar, one, knowledge of law, and two, character and fitness. Knowledge of law is proven by the certificate of the Board of Law Examiners. The issue of character and fitness is, in New York, referred to its Committee on Character and Fitness, where it is not processed as an issue of fact. It is apparent that the courts in New York proceed on the rule, long prevalent, that membership in the Bar is a privilege, and not a right. Had the petitioner been accorded a formal trial of the issue of character, the two written communications would have been inadmissible as evidence and disregarded. Facts can only be found on competent evidence, properly adduced from witnesses, who must confront the parties, be sworn and submit to cross-examination. An *ex parte* statement, oral or written, is not competent evidence, and a finding of fact based thereon is not a foundation upon which a decree can rest, and is a nullity. ♡

Mr. Justice Harlan in his prevailing opinion in the recent case of *Cohen v. Hurley*, 366 U. S. 117, said "that a state may not arbitrarily refuse a person permission to practice law. That petitioner's numerous applications for admission to the Bar were treated arbitrarily and capriciously can hardly be questioned. The refusal of the Committee to appear in the proceeding is clear evidence of arbitrariness. It treated the applications, not as steps in a judicial proceeding, but as ministerial acts of an administrative agency of government.

Admission to and Membership in the Bar is Not a Mere Privilege But a Right

The general rule is that admission to and membership in the Bar is a mere privilege, revokable for any cause. Webster defines the word as "a right, immunity, benefit or advantage enjoyed by a person or a body of persons beyond the common advantage of other individuals". However, a privilege available to every one, may not be denied to anyone, except for sound legal reasons, proved by competent evidence.

Mr. Justice Black, in his dissenting opinion in *Cohen v. Hurley* (*supra*) said:

"I can see no justification for the notion that membership in the Bar is a mere privilege conferred by the state and is therefore subject to withdrawal for the 'breach' of whatever vague and indefinite 'duties' of the courts and other lawyers may see fit in a case-by-case basis."

So far as our research discloses, the Supreme Court has hitherto refrained from interfering in cases involving questions of the right of admission to and membership in the Bar apparently on the theory that such matters are solely the province of the state courts. But the trend to accept jurisdiction has been unmistakable. The recent cases of *Koenigsberg v. State Bar of California*, 353 U. S. 252, and *Schwager v. Board of Law Examiners*, 353 U. S. 232, clearly evidences it.

The Right to Admission to the Bar is Property

Courts could not adequately function without lawyers. They are a part of the judicial system. Hence, the state invites persons who possess a certain amount of academic education to engage in the study of law, and impliedly promises and agrees that if the person who accepts the

invitation, passes the bar examination and is of good moral character, he will be licensed to practice law as a profession. The candidate for admission spends three or four years in law school, pays tuition fees, buys books and necessarily is compelled to refrain from engaging in remunerative employment during the period of study, has created a thing of material value, an asset or property. The asset loses all its value when a committee of lawyers holds that he lacks good moral character. Mr. Justice Black in his opinion in the *Koenigsberg* case, discussing the subject of character, said:

"The term 'good moral character' has been long used as a qualification for membership in the Bar, and has served a useful service in this respect. However, the term itself is unusually ambiguous. It can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. Such a vague qualification, which is easily adopted to fit personal views and predilections can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."

Confrontation

The right to an accused to confront his accuser is a right so elemental that citation of authority is unnecessary. It is a constitutional right which antedates Magna Carta, for, without it, cross-examination cannot be had, and a denial of cross-examination is a denial of due process. Petitioner has been deprived of his property by confiscation.

Conclusion

The issue here is the right of confrontation, and whether a denial of it, is a violation of petitioner's rights under the Fifth and Fourteenth Amendments of the Federal Constitution. The Court of Appeals virtually presented the question to this court when it amended the remittitur. It is a question of broad, general interest to every law student in the nation. So far as research discloses, the right of confrontation in a case of this kind has never been passed upon.

The writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted;

HENRY WALDMAN,
Attorney for Petitioner,
5 Beekman Street,
New York 38, New York.

HENRY WALDMAN,
of Counsel.

APPENDIX A

Order of New York Court of Appeals Granting Motion to Amend the Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New
York, held at Court of Appeals Hall in the
City of Albany on the twenty-sixth day of
April A. D. 1962.

Present:

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

— o —

Mo. No. 331

In the Matter of the Application of

NATHAN WILLNER,

Appellant,

for an Order Permitting him to file his application for
admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL
DEPARTMENT,

Respondent.

— o —

A motion to amend the remittitur in the above cause
having been heretofore made upon the part of the appel-
lant herein and papers having been submitted thereon
and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby
is granted. Return of the remittitur requested and, when
returned, it will be amended by adding thereto the fol-
lowing:

Upon the appeal herein there was presented and
necessarily passed upon a question under the Con-

Appendix A

stitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights.

AND the Appellate Division of the Supreme Court, First Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

(Seal)

APPENDIX B

Amended Remittitur

No. 113

In the Matter of the Application of

NATHAN WILLNER,

Appellant,

for an Order Permitting him to file his application for
admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL
DEPARTMENT,

Respondent.

BE IT REMEMBERED, That on the 9th day of March in the year of our Lord one thousand nine hundred and sixty-two, Nathan Willner, the appellant in this cause, came here unto the Court of Appeals, by Henry Waldman, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Committee on Character and Fitness, First Judicial Department, the respondent in said cause, for whom there was no appearance.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry Waldman, of counsel for the appellant, no appearance for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is

Appendix B

affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily upon a question under the Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.